No. 92-6073

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eighth Amendment applies to a statutory *in rem* forfeiture of property.

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OPINION BELOW

The opinion of the court of appeals (J.A. 21-29) is reported at 964 F.2d 814.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 2, 1992. The petition for a writ of certiorari was filed on September 30, 1992, and was granted by the Court on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 21 U.S.C. 881(a)(4) and (7) provide:

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—
>
> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act of omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.
>
> * * * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881 (1988 & Supp. III 1991) and 28 U.S.C. 524(c) (1988 & Supp. III 1991) are reprinted in full at App., *infra*, 1a-18a.

STATEMENT

1. Under 21 U.S.C. 881(a), certain assets that are used in, derived from, or intended for use in, drug trafficking are subject to forfeiture. Those forfeitable assets include controlled substances, raw materials, and equipment used in the manufacture of controlled substances, and containers used for illegal drugs or

for any raw materials used in drug manufacture. See 21 U.S.C. 881(a)(1)-(3) and (9). Section 881(a)(4) also authorizes forfeiture of any conveyance (such as an aircraft, an automobile or a vessel) that is used or intended for use "in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of such controlled substances, raw materials, or containers. Section 881(a)(7) provides for forfeiture of "[a]ll real property * * * and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a [federal narcotics felony]." A forfeiture mandated by Section 881(a) is enforced by means of a civil *in rem* action against the assets in question. The statutes relating to the seizure and condemnation of property for violations of the customs laws apply in those *in rem* proceedings. See 21 U.S.C. 881(d).

2. On September 7, 1990, the United States filed an *in rem* action in the United States District Court for the District of South Dakota, seeking forfeiture under 21 U.S.C. 881(a)(4) and 881(a)(7) of a parcel of real property and related improvements known as the Garretson Body Shop and of a mobile trailer home, both of which were located in Garretson, South Dakota. J.A. 3-6. The complaint was supported by the affidavit of Donald Satterlee, a narcotics detective with the Sioux Falls, South Dakota, Police Department, who alleged that petitioner had used the real property and the trailer to sell cocaine on June 13, 1990. J.A. 7-8. Satterlee's affidavit alleged that on that date a government informant had accompanied Keith Engebretson, a known narcotics user, to the Garretson Body Shop to purchase one gram of cocaine. At the shop, petitioner agreed to sell cocaine to Engebretson. Petitioner then went to his nearby

trailer home. Upon his return to the shop, petitioner sold Engebretson two grams of cocaine for an unknown amount of money. *Ibid.*

Satterlee's affidavit further alleged that a search warrant was executed by state authorities on the shop and the mobile home on the day after petitioner's sale to Engebretson, and that the search revealed additional cocaine, some marijuana, and narcotics paraphernalia. J.A. 8. The inventory filed upon the return of the search warrant, which was an exhibit to Satterlee's affidavit, revealed that agents seized from the trailer home a small bag of cocaine; a small bag of marijuana; a bindle of cocaine marked "½"; an electric Ohaus scale; a plate with white powder residue, found together with a razor blade and a straw; a pipe; a "coke snorter"; and $660 in $20 bills. C.A. App. 92. At the body shop, the agents seized a .22 caliber revolver; a small bag of marijuana; two marijuana pipes; a piece of mirror, found together with a white tube and a razor blade; and $3,300 in cash. C.A. App. 92-93. The agents also seized $772 in cash from petitioner. Following the institution of forfeiture proceedings by the United States, petitioner filed a claim alleging ownership of the two properties and an answer to the complaint. J.A. 1, 9-11.

The government subsequently moved for summary judgment. The government relied in part on a new affidavit by Detective Satterlee. In addition to the facts described above, the new affidavit alleged that on October 23, 1990, petitioner had "admitted to the distribution and possession [of cocaine] as charged in open court, and pled guilty in * * * state court to possession with intent to distribute cocaine" and that petitioner had subsequently been sentenced to seven

years' imprisonment. J.A. 14-15. The government also adverted to petitioner's deposition testimony, during which he had declined to answer on Fifth Amendment grounds any questions relating to the weapon, narcotics, paraphernalia, and cash found in the two properties, or the cash found on his person, and in which petitioner had likewise declined to answer whether the two properties had ever been used to facilitate narcotics trafficking. See C.A. App. 96-97 (government motion); C.A. App. 58-68, 72-81, 83-84 (petitioner's deposition). Petitioner opposed summary judgment on the ground, among others, that the civil forfeiture of the two properties would violate the Cruel and Unusual Punishments Clause and the Excessive Fines Clause of the Eighth Amendment C.A. App. 125.

At the hearing on the government's motion, petitioner's counsel conceded "that there was an exchange of cocaine in the body-shop," and that the items listed in the search warrant inventory, including the drugs and money, were found in the body shop and mobile home. See C.A. App. 161, 165. Petitioner's counsel contended, however, that those facts did not constitute a "substantial connection or substantial association or sufficient nexus which would justify the seizure of that property * * * [under] the Eighth Amendment." C.A. App. 161. The district court rejected that argument, concluding that the undisputed facts established a sufficient nexus between the two properties and petitioner's drug transactions, and that the "forfeiture laws [did] not violate any constitutional rights of the [c]laimant and [did] not constitute excessive fines or cruel and unusual punishment." J.A. 19, 20. Accordingly, the

court entered judgment in the government's favor. J.A. 20.

3. The court of appeals affirmed. It first concluded that the government's summary judgment affidavit "demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity." J.A. 24. The court explained that the body shop "was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction," and that the affidavit "tend[ed] to support the inference that the mobile home was used as a place to store drugs." *Ibid.* Because petitioner did "not dispute the government's claim that [he] sold drugs at the body shop," and because he did "not counter any of the facts tending to demonstrate the mobile home was used to store drugs," the court concluded that petitioner "failed to carry his burden * * * to raise any genuine factual issues," and that "summary judgment in favor of the government was [therefore] appropriate." J.A. 24-25.

The court of appeals next rejected petitioner's claim that the forfeiture of the mobile home and body shop violated the Eighth Amendment. J.A. 25-28. The court of appeals noted that the Third and Fourth Circuits have held the Eighth Amendment inapplicable to purely civil proceedings, such as *in rem* forfeitures, but it declined to decide definitively whether "application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil." J.A. 27 n.5. Instead, the court focused on the *in rem* nature of the forfeiture proceedings, noting that "[b]ecause the government is proceeding against the 'offending' property, the guilt or innocence of the property's owner is constitutionally irrelevant."

J.A. 26, citing *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-687 (1974). The court explained that the type of proportionality review sought by petitioner would conflict with that basic premise of *in rem* actions, and it therefore "agree[d] with the Ninth Circuit that '[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners * * * the constitution hardly requires proportionality review of forfeitures.'" J.A. 26, quoting *United States* v. *Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). The court of appeals conceded that the *in rem* nature of the proceeding might "mean little" when viewed solely from petitioner's perspective, and that in that light it did "appear that the government [was] exacting too high a penalty in relation to the offense committed," but the court nonetheless believed it clear "that the Constitution does not require proportionality * * * in civil proceedings for the forfeiture of property." J.A. 27-28.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The question in this case is whether the prohibitions against "excessive fines" and "cruel and unusual punishments" require that an *in rem* civil forfeiture of property be "proportional" to the culpability of the owner of the property. Seven courts of appeals have concluded that the Eighth Amendment requires no proportionality analysis of civil *in rem* forfeitures, either because that Amendment limits governmental action only in criminal cases, or because the unique nature of *in rem* actions—with their long common

law history and their exclusive focus on the harmful use of property—renders irrelevant the culpability of the owner even if that Amendment is otherwise applicable to civil actions. See *United States* v. *One Parcel of Real Property with Buildings*, 960 F.2d 200, 206-207 (1st Cir. 1992); *United States* v. *Certain Real Property Commonly Known as 6250 Ledge Road*, 943 F.2d 721, 727 (7th Cir. 1991); *United States* v. *Real Property & Residence at 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991); *United States* v. *One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-401 (3d Cir. 1990); *United States* v. *Tax Lot 1500*, 861 F.2d 232, 233-235 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989); *United States* v. *Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989). The Second Circuit alone has taken the view that proportionality analysis under the Eighth Amendment is applicable to civil *in rem* forfeitures. *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 35-39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992).[1] The majority view is correct.

1. This Court has long understood the Eighth Amendment to be addressed to the prosecutorial functions of government. In light of the Eighth Amendment's concern with the criminal laws, the Framers could not have believed that civil *in rem* forfeitures were subject to Eighth Amendment scrutiny. Those forfeitures have never been considered criminal pun-

[1] The Sixth Circuit recently adverted to the conflict, but declined to take sides after finding that the forfeiture at issue would be proportional to the culpability of the property's owner even if the Eighth Amendment were applicable. See *United States* v. *Certain Real Property 566 Hendrickson Boulevard*, No. 92-1220 (6th Cir. Feb. 26, 1993), slip op. 13-17.

ishments. On the contrary, the common law courts in this country were exercising jurisdiction *in rem* in the enforcement of civil forfeiture statutes long before the adoption of the Constitution, and laws providing for the forfeiture of property involved in criminal activity were among the earliest statutes enacted by Congress. Under federal forfeiture statutes, as under the common law, property involved in criminal activity is treated as the offender. And because the forfeiture action is concerned principally with the removal of harmful property, this Court has always treated the guilt or innocence of the property's owner as irrelevant.

This Court has refused to redefine *in rem* forfeiture actions solely in accordance with their effects on the owner of the property. Instead, it has adhered to the historical focus of those actions on the harm caused by the offending property. The Court's refusal to disregard the teaching of history in its treatment of *in rem* forfeitures reflects its recognition that property used in ways harmful to the public welfare may properly be considered a common nuisance. Forfeiture laws therefore are based on the premise that certain uses of property are so undesirable that the owner engages in those uses or surrenders control of the property at his peril. By threat of forfeiture, the law does nothing more than enlist the care and responsibility of the property's owners in aid of the public policy reflected in the criminal laws, and precludes evasions by dispensing with the necessity of judicial inquiry into any collusion between the wrongdoer and the alleged innocent owner. In short, when experience has demonstrated that an owner is unable or unwilling to safeguard the community against misuse of his property, the threat of future harm

posed by the property amply justifies its forfeiture. The forfeiture in this case illustrates that point, since the nature of the evidence seized from the two properties—well-known tools of narcotics distribution—indicates that those properties posed the very threat with which Congress was concerned.

2. Petitioner's alternative contention that the forfeitures in this case are "in effect" punishment, and thus subject to the Eighth Amendment, also fails. This Court has long recognized that the determination whether a sanction constitutes punishment is not made from the perspective of the party advancing that claim. In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the Court identified a number of factors helpful in determining whether a particular sanction constitutes punishment. Those factors indicate that civil *in rem* forfeitures are remedial, not punitive. That is especially true under the drug forfeiture statute at issue here. Forfeitures under Section 881 not only remove the threat of continued drug dealing from the subject property, but they also help fund the government's effort to combat the effects of narcotics trafficking, such as urban blight, violent crime, and addiction. In addition, the conclusion that forfeitures under Section 881 are remedial is consistent with this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989). *Halper* held that, in rare cases, sanctions that could not plausibly serve the remedial functions the government assigns to them may be considered punishment under the Double Jeopardy Clause. That holding does not aid petitioner because *in rem* forfeitures necessarily serve the remedial purpose that justifies them—by removing the subject property from those who have rendered it harmful, and by compensating the victims of that harmful activity.

3. The forfeitures in this case should be upheld even if petitioner is correct that those forfeitures must pass "proportionality" scrutiny under the Eighth Amendment. The forfeiture of petitioner's property is well tailored to the government's interests both in obtaining compensation for the costs society has incurred and will continue to incur as a result of drug trafficking, and in protecting the community from further drug dealing. In addition, the evidence seized from the two forfeited properties showed that petitioner was engaged in the retail sale of cocaine, and that he was in possession of drugs, narcotics paraphernalia, and a subsantial amount of cash in small bills. The forfeiture of a house trailer and the premises of a small business was not grossly disproportionate to the serious narcotics distribution and possession offenses established by that evidence.

ARGUMENT

THE *IN REM* CIVIL FORFEITURE IN THIS CASE IS NOT LIMITED BY THE EIGHTH AMENDMENT

A. The Eighth Amendment Does Not Reach Civil *In Rem* Forfeitures, Which Have Long Been Recognized As Remedial Regulations Of Property

Petitioner's principal submission is that the Excessive Fines Clause of the Eighth Amendment applies to civil "penalties," or "sanctions" and that the Eighth Amendment therefore proscribes excessive forfeitures of property, even when those forfeitures result from civil *in rem* proceedings. Pet. Br. 10-23. Petitioner's claim fails because the text and history of the Eighth Amendment reflect the Framers' intention to limit only the prosecutorial function of government; that is, the Amendment was meant to apply only to penalties or exactions that may fairly be

viewed as criminal punishment. The remedial nature of *in rem* forfeiture actions and their long and unique common law history demonstrate that those forfeitures are not penal in nature. *In rem* forfeitures therefore are not limited by the Eighth Amendment.

1. This Court has long understood the Eighth Amendment to be principally "addressed to courts of the United States exercising criminal jurisdiction." *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833) (Story, J.). As the Court explained in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), that focus is evident from the words chosen by the Framers, since "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." In view of the clear implication of the constitutional text, and after a careful review of the historical record, the *Ingraham* Court rejected the claim that disciplinary corporal punishment of school children is subject to the Amendment's strictures against "cruel and unusual" punishments.

More recently, after again canvassing the historical record, the Court rejected the claim that punitive damages awarded in private civil suits are limited by the Excessive Fines Clause. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The Court reaffirmed that the scope of the Eighth Amendment, including the scope of the Excessive Fines Clause, turns solely "on its original meaning, as demonstrated by its historical derivation" —that is, by "the purposes which directed its Framers." 492 U.S. at 264 n.4. That history, as reviewed by this Court in *Browning-Ferris* and other cases,

confirms what the text of the Amendment suggests: that the Excessive Fines Clause was intended to "limit[] the ability of the sovereign to use its *prosecutorial* power * * * for improper ends." *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267 (emphasis added); *id.* at 275 ("the text of the Amendment points to an intent to deal only with the prosecutorial powers of government").

The Eighth Amendment derived from the Virginia Declaration of Rights of 1776, which was in turn derived from the English Bill of Rights of 1689. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 266-267; *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2686-2688 (1991) (opinion of Scalia, J.); *Ingraham* v. *Wright*, 430 U.S. at 664-665. Most historians believe that the English Bill of Rights was adopted in reaction to the excesses of English judges under the reign of James II, notably the abuses attributed to Lord Chief Justice Jeffreys. Jeffreys presided over the treason trials that followed the rebellion of the Duke of Monmouth in 1685, and over the perjury prosecution of Titus Oakes, a Protestant cleric whose false accusations had caused the death of 15 prominent Catholics. Oakes was fined 1000 marks on each count of the indictment, imprisoned for life, and required to stand in the pillory annually. See *Ingraham* v. *Wright*, 430 U.S. at 664-665; *Harmelin* v. *Michigan*, 111 S. Ct. at 2687-2689 (opinion of Scalia, J.).

Aside from the general illegality and cruelty of the nonmonetary punishments imposed by the King's Bench, that court's abuse of criminal fines was a particular source of concern to the drafters of the English Bill of Rights. See *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267. In keeping with their history as an alternative to incarceration, fines imposed by common law courts frequently required a defendant to stand committed until he paid the required sum. See, *e.g.*, *Ex parte Watkins*, 32 U.S. (7 Pet.) at 575 (noting that the common law practice was "to commit the offender for payment of the fine"); see also 2 F. Pollock & F. Maitland, *History of English Law* 517 (2d ed. 1952).[2] Thus, when the fines imposed by the King's Bench became more excessive and partisan, "some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 267. In light of that history, it is hardly surprising that the Court concluded that "at the time of the drafting and ratification of the [Eighth] Amendment * * * as now, fines were assessed in *criminal*, rather than in private civil, actions," *id.* at 265 (emphasis added), and that, accordingly, "the word 'fine' was understood to mean a payment to a sovereign *as punishment* for some offense." *Ibid.* (emphasis added).[3]

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[2] In this country, imprisonment was commonly used to compel the payment of fines even by indigents until quite recently, when the practice was outlawed as a violation of the equal protection rights of those unable to pay. See *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) (footnote omitted) ("The custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England and has long been practiced in this country. At the present time almost all States and the Federal Government have statutes authorizing incarceration under such circumstances.").

[3] Indeed, even the dissenting opinion in *Browning-Ferris* did not suggest that nonpenal, remedial exactions are in any

While the Court has not foreclosed the possibility that the Eighth Amendment might be found applicable in some nominally civil cases, see *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. at 263-264, the restrictions on liberty or other penalties presented by any such case must be "sufficiently analogous to criminal punishments in the circumstances in which they are administered." *Ingraham* v. *Wright*, 430 U.S. at 669 n.37. Thus, any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted.

2. Petitioner's challenge to the civil *in rem* forfeiture of property used in unlawful activity cannot meet that burden. The Framers of the Eighth Amendment were quite familiar with civil *in rem* forfeitures and, in light of the ancient common law lineage of those forfeitures, the Framers could not have believed them part of an individual's punishment.

As this Court's opinions have made clear, the concept of forfeiture traces its origin to the English common law practice of confiscating "deodands," or inanimate objects that had caused the death of a King's subject. The object was forfeited to the King, "in the belief that the King would provide the money for Masses to be said for the good of the dead man's

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way limited by the provisions of the Eighth Amendment. See 492 U.S. at 282, 298 (O'Connor, J., concurring in part and dissenting in part) (arguing that punitive damages, even if imposed as a result of private litigation, are penal sanctions).

soul, or insure that the deodand was put to charitable uses." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-681 (1974). Because the common law considered the object itself to be the guilty party, it was irrelevant whether the owner of the object was innocent of any wrongdoing. *Id.* at 683.[4]

Although "[d]eodands did not become part of the common-law tradition of this country," *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 682, "[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes," *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943). Therefore, "the common law as received in this country at the time of the adoption of the Constitution gave a remedy *in rem* in cases of forfeiture." *Id.* at 153; *see also United States* v. *92 Buena Vista Ave.*, 113 S. Ct. 1126, 1131-1133 (1993) (opinion of Stevens, J.). Indeed, laws providing for the forfeiture of property involved in criminal activity—from violations of customs and impost laws

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[4] While this Court has always affirmed that the "innocence" of a property owner is no bar to the application of civil forfeiture statutes that do not make such innocence a defense, see, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 688-689, the Court has also stated "that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent * * * [or] an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689. This Court's references to "innocence" therefore connote a property owner's exercise of a high level of care with respect to his property.

to piracy—were among the earliest statutes enacted by Congress. See, *e.g.*, Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs offenses); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1132 (opinion of Stevens, J.). "Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages." *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1132 (opinion of Stevens, J.). The enactment of forfeiture statutes has not abated; "contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 683.

This Court frequently has been urged to disregard the historical focus of *in rem* forfeitures on the offending property, and to redefine those actions solely in accordance with their effects on the owner of the property. The Court has recognized, however, that "whether the reason [for civil forfeiture statutes] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 511 (1921), and under that established view "[i]t is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental." *Id.* at 513.[5] Accordingly, despite

[5] See also *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"); *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 400 (1878) (the law "treat[s] the vessel in which * * * a wrong or offence has been committed, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.) ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*").

the "comparative severity" of forfeiture statutes, they repeatedly "have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938). Thus, the Court has ruled that civil *in rem* forfeitures are not limited by the Fifth Amendment's Double Jeopardy Clause, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363-366 (1984), the Sixth Amendment's Confrontation Clause, *United States* v. *Zucker*, 161 U.S. 475, 480-482 (1896), or the due process requirement of proof beyond a reasonable doubt at a criminal trial, *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 271-272 (1878). The Court has time and again also upheld forfeiture statutes against the claim that they deprive innocent owners of their property without due process or that they effect takings of property without compensation. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 680, 685; *Van Oster* v. *Kansas*, 272 U.S. 465, 468 (1926); *J.W. Goldsmith, Jr.-Grant Co* v. *United States*, 254 U.S. at 510-511.

The Court's persistent refusal to disregard the teaching of history in its treatment of *in rem* forfeitures does not stem from any blind adherence to "anachronistic" or "superstitious" notions (see ACLU Br. 20-21 & n.17), but from its recognition that property used in ways manifestly inimical to the public welfare may properly be considered a "common nuisance." *Van Oster* v. *Kansas*, 272 U.S. at 466. By the threat of forfeiture, the law does nothing more than to "interpose[] the care and responsibility of [the property's] owners in aid of the prohibitions of the law and its punitive provisions." *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. at 510. Thus, if an owner allows his property to be turned into a haven for harmful activity, it is entirely appropriate for society to place that property in more careful hands, by sale or otherwise, "as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) (Story, J.); accord *Dobbins's Distillery* v. *United States*, 96 U.S. at 400-401; cf. *Republic National Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (*in rem* forfeiture developed, in part, "to furnish remedies for aggrieved parties"). As this Court explained in *Van Oster* v. *Kansas*:

> It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien * * * are familiar examples. * * * They suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process.

272 U.S. at 467-468; *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 687-688 (noting that forfeiting the criminally used property even when the owners are innocent "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property"); see also *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. at 511 (noting that Blackstone ascribed the misfortunes caused by deodands "to the negligence of the owner"). Thus, when experience has demonstrated that an owner is unable or unwilling to safeguard the community against misuse of his property, the threat of future harm posed by the property amply justifies its forfeiture.

The possibility of further unlawful use of property was a danger Congress expressly recognized and specifically sought to prevent in 1939 when it enacted 49 U.S.C. App. 781, 782, the statutes on which Section 881 (as well as the Puerto Rican statute at issue in *Calero-Toledo*, see 416 U.S. at 686-687 & n.25) is based. As the Committee Report explained:

> There is nothing either novel or unprecedented about the provisions of this bill. They merely extend to the narcotic, counterfeiting, and firearms laws existing statutory provisions for for-

feiting the means of transportation used to facilitate violations of the customs and other laws. Such measures have been in use for customs and other purposes since the very beginning of our Government. * * *

[The customs laws were recently amended] to make discretionary with the courts the former mandatory provisions for the release under bond of vessels seized for violations of the customs laws pending judicial proceedings looking toward forfeiture. This amendment was made necessary by the fact that vessels seized for violations of the customs laws and released on bond frequently returned immediately to the smuggling traffic. Instances were not uncommon of vessels being seized three or four times for different violations and being released on bond each time before the first forfeiture proceeding came up for trial. * * *

> The present legislation * * * is made doubly necessary because not infrequently the means of transportation employed in violations of the laws involved * * * are peculiarly adapted to such type of work as, for instance, high-speed powerboats, fast cars with secret compartments, and aircraft. If such means of transportation are not forfeited, they will be readily available for future violations.

H.R. Rep. No. 1054, 76th Cong., 1st Sess. 2-3 (1939); see also S. Rep. No. 926, 76th Cong., 1st Sess. 2 (1939); H.R. Rep. No. 2751, 81st Cong., 2d Sess. 3 (1950) (noting that "[v]essels, vehicles, and aircraft may be termed the operating tools of dope peddlers * * *. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.").

When Congress first enacted what is now Section 881(a), see Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511(a), 84 Stat. 1276, it likewise authorized the forfeiture not only of the illegal substances themselves, but also of all conveyances used to facilitate the manufacture and distribution of drugs. The 1970 statute therefore "closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws" in that it "generally authorized the forfeiture of property used in the commission of criminal activity, and [it] contained no innocent owner defense." *United States* v. *92 Buena Vista Ave.*, 113 S. Ct. at 1133-1134 (opinion of Stevens, J.). In 1984, Congress added to the list of forfeitable assets any real property that is used or intended to be used to facilitate a felony drug transaction, while at the same time making innocent ownership a defense to forfeitures of real property in certain circumstances. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, § 306(a), 98 Stat. 2050, codified at 21 U.S.C. 881(a)(7). In so doing, Congress simply recognized that forfeiture of tainted real property, like forfeiture of other facilities of the drug trade, would also "deprive offenders * * * of the instruments through which they might commit further crimes * * * [and would] protect[] the community from the threat of continued drug dealing." *United States* v. *Cullen*, 979 F.2d 992, 994 (4th Cir. 1992).

It was those provisions of the civil drug forfeiture statutes—addressing conveyances and real property—that were invoked to forfeit petitioner's trailer home and repair shop. And the forfeiture of those

properties served the remedial purposes traditionally underlying *in rem* forfeiture statute, for the evidence seized from the two forfeited properties—including well-known tools of the narcotics trade, see, *e.g.*, *United States* v. *One Parcel of Real Property*, 900 F.2d 470, 475 (1st Cir. 1990) (Ohaus scale and firearm)—indicated that the properties posed the very threat with which Congress was concerned.

3. Unable to establish that the Framers could have believed that *in rem* civil forfeitures were criminal punishments regulated by the Eighth Amendment, petitioner devotes a large part of his brief to the proposition that forfeitures of property are analogous to medieval "amercements," or royal penalties that were limited by the provisions of Magna Carta. In petitioner's view, the Excessive Fines Clause should be read as a limit to all civil penalties that might have been thought of as amercements in medieval times. Pet. Br. 10-23, 45-46. The short answer to petitioner's "intriguing" argument, *Browning-Ferris*, 492 U.S. at 268, is that the Court has "hesitate[d] to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation * * * urged * * * appears to conflict with the lessons of more recent history," *ibid.*—*i.e.*, that "the Excessive Fines Clause * * * limit[s] the ability of the sovereign to use its *prosecutorial* power, including the power to collect fines, for improper ends." *Id.* at 267 (emphasis added); see also *Solem* v. *Helm*, 463 U.S. 277, 284 n.8 (1983) (noting that an amercement "was the most common *criminal* sanction in 13th-century England") (emphasis added). In any event, whatever role there may be for petitioner's historical argument with respect to

in personam civil penalties imposed by the government, petitioner does not cite any historical evidence supporting his theory that *in rem* forfeitures ever were considered "amercements"—much less the "fines" of which the Eighth Amendment speaks. To the contrary, as discussed above, the unique common law history of *in rem* forfeitures undermines petitioner's submission.

There is no greater merit in petitioner's apparent contention that civil forfeitures must be subject to Eighth Amendment scrutiny because, like the fines limited by the Amendment, they are a source of revenue to the government. Pet. Br. 21-22 (citing *Harmelin* v. *Michigan*, 111 S. Ct. at 2693 n.9 (opinion of Scalia, J.)); see also ACLU Br. 26 n.20. As we discuss in more detail below, the effects of the drug trade, such as urban blight, significantly increased violent crime, and drug addiction and other health problems, require societal expenditures that far outweigh the "revenue" the government derives from asset forfeitures. Moreover, petitioner's argument proves too much, because not even petitioner suggests that any financial levy—including presumably all federal, state, and local taxation—is subject to Eighth Amendment scrutiny. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 631-632 (1989). If the historical record demonstrates that a financial levy is not and has never been an Eighth Amendment "fine," that levy cannot be transformed into one by the mere claim that it might some day be set at too high a level. Cf. *Harmelin* v. *Michigan*, 111 S. Ct. at 2697 n.11 (opinion of Scalia, J.). At any rate, petitioner is simply wrong in asserting that civil forfeitures present the same possibilities for abuse as the criminal fines that *are* covered by

the Eighth Amendment. At least where property is forfeited as a result of narcotics trafficking by its owner, as is the case here, *in rem* civil forfeitures differ markedly from criminal fines in that the trafficker alone, not the government, selects the size of the "penalty." Cf. *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 n.6 (1991). "So far as the public welfare is concerned, the Ferrari is at least as harmful an instrumentality as the Chevette." *United States* v. *Cullen*, 979 F.2d at 995. A trafficker's voluntary choice of the Ferrari as the means best adapted to ply his harmful trade does not raise any danger with which the Eighth Amendment is concerned.

B. Section 881 Forfeitures Should Not Be Re-Classified As "Penal" Under Any Test Previously Applied By This Court

Petitioner alternatively contends (Br. 18, 28-33) that civil forfeitures under Section 881(a) are subject to Eighth Amendment limitations because they "are, in effect, punishment," in light of this Court's analysis in two prior decisions—*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and *United States* v. *Halper*, 490 U.S. 435, 447-450 (1989).

1. In *Kennedy* v. *Mendoza-Martinez*, the Court considered a section of the Nationality Act of 1940 that "automatically strip[ped] an American of his citizenship * * * whenever [he] depart[ed] from or remain[ed] outside the jurisdiction of this country for the purpose of evading his military obligations," 372 U.S. at 166, and found "conclusive evidence of congressional intent" to treat denationalization as punishment. *Id.* at 169. In so doing, the Court identified seven factors as useful in determining whether a law

is penal or regulatory in character (*id.* at 168-169) (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

While that list of considerations is instructive, it is "neither exhaustive nor dispositive." *United States* v. *Ward*, 448 U.S. 242, 249 (1980); see also *Bell* v. *Wolfish*, 441 U.S. 520, 535-540 (1979).

Because petitioner concedes, as he must, that Congress enacted "section 881 * * * as a civil remedy," Pet. Br. 28, "only the clearest proof could suffice to establish," *United States* v. *Ward*, 448 U.S. at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)), that "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *United States* v. *Ward*, 448 U.S. at 248-249; accord *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 362-363. As was the case in *One Assortment of 89 Firearms*, where this Court held an *in rem* forfeiture of property involved in criminal activity was not punishment under the *Mendoza-Martinez* test, that proof is absent here.

Thus, the sanction of forfeiture imposes no "affirmative disability or restraint" on the property's owner. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S.

at 168. As we have noted, forfeiture has not "historically been regarded as a punishment." *Ibid.* It does not "come[] into play only on a finding of *scienter*," *ibid.*, since scienter is irrelevant to an *in rem* forfeiture. To be sure, the operation of Section 881(a) may have the incidental effects of promoting deterrence and even retribution. See 372 U.S. at 168. But the principal purposes of forfeiture are different—to make the offending property unavailable for continuing use in the commission of criminal acts, and to secure some compensation for those injured by those criminal acts. See *id.* at 169; see also *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) at 233.

Petitioner concentrates his attack principally on the fact that much of the conduct covered by Section 881(a) is defined as criminal under the federal narcotics laws. Pet. Br. 30-32. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168. As this Court has explained, however, "that indication is not as strong as it might seem at first blush" because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 365 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399), and has done so in a variety of contexts. See also *United States* v. *Ward*, 448 U.S. at 249-250. In *One Assortment of 89 Firearms*, this Court found far more significant the fact that the statute being challenged, like Section 881(a), subjected to forfeiture property "used *or intended to be used in*" violations of the law defining the related criminal offense. 465 U.S. at 363 (emphasis by the Court). Because the law defining the related crime did "not render unlawful an *intention*," the Court found it "apparent * * * that the forfeiture provisions * * * were meant to be broader

in scope than the criminal sanctions," *id.* at 363-364 (emphasis by the Court), and thus "the forfeiture remedy [could not] be said to be coextensive with the criminal penalty." *Id.* at 366.

In a related argument, petitioner's amici make much of the fact that Congress has enacted parallel criminal forfeiture provisions, see 21 U.S.C. 853, that in some circumstances can be used in lieu of the civil forfeitures prescribed by Section 881. See ACLU Br. 6-8; NACDL Br. 9. *In personam* forfeiture statutes, though well grounded in the English common law, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 682-683, were unknown in this country until the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. See 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed. 1982) ("Until 1970 American law did not use the concept of a 'criminal forfeiture' "). Far from evincing Congress's intent to treat civil forfeiture as "punishment," as amici suggest, the advent of criminal forfeiture provisions, including 21 U.S.C. 853, generally reflects congressional efforts to make the advantages of the forfeiture remedy more readily available in various circumstances, particularly in light of the acute problem presented by the backlog of civil matters in federal courts. See S. Rep. No. 225, 98th Cong., 1st Sess. 195-197 (1983). In addition, *in personam* actions sometimes make it possible for the government to seize comparable or "substitute" assets of the drug trafficker when he or his confederates manage to secrete tainted property—thus placing that property beyond the reach of an action *in rem* and potentially depriving society of compensation for the unlawful conduct. Contrary to the suggestions of petitioner's amici, the creation of a remedy of forfei-

ture that functions as part of a criminal prosecution does not suggest that the separate civil *in rem* forfeiture remedy is inherently punitive. In fact, the creation of separate criminal and civil remedies suggests just the opposite. What is more, even with respect to *in personam* forfeitures, the fact that relief is available as part of the criminal process does not render the remedy inherently punitive, any more than the comparable availability of restitution (see 18 U.S.C. 3663) makes the government's interest in victim compensation inherently "penal."

Far more important than any partial overlap with the criminal forfeiture provisions or the laws defining the related narcotics crimes is the fact that the forfeiture provision of Section 881 "furthers broad remedial aims." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 364. As Justice Kennedy recently noted, "[p]ossession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin* v. *Michigan*, 111 S. Ct. at 2705-2706 (concurring opinion) (quoting *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 668 (1989)); accord *Florida* v. *Royer*, 460 U.S. 491, 513, 519 (1983) (Blackmun, J., dissenting). Quite apart from the health and related problems created by addiction alone, "[s]tudies * * * demonstrate a direct nexus between illegal drugs and crimes of violence," *Harmelin* v. *Michigan*, 111 S. Ct. at 2706 (Kennedy, J., concurring in part and concurring in judgment), including the bulk of homicides, assaults, robberies, and weapons offenses for which national figures are available. *Ibid.*

The drain on the public fisc attributable to the vastly increased law enforcement expenses that have

accompanied the drug epidemic, and to the care, treatment, and rehabilitation of drug addiction and related problems is practically incalculable—and easily dwarfs the value of assets acquired by the government as a result of asset forfeitures. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991*, at 2 (1992) (noting that federal, state, and local governments expended $31.8 billion for police protection during Fiscal Year 1990, exclusive of judicial, legal services, and correctional outlays); D. Rice, S. Kelman, L. Miller & S. Dunmeyer, *The Economic Costs of Alcohol and Drug Abuse and Mental Illness: 1985*, at 23-24 (1990) [hereinafter Rice] (calculating the economic costs of drug addiction during 1985 at $44.1 billion, including $13.2 billion attributable to increased police and related costs). Compare U.S. Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* at 31 (1990) (during Fiscal Year 1990 the Department of Justice Asset Forfeiture Fund received deposits of $460 million from all federal forfeiture statutes, and an additional $43 million in property was placed into "official use" by law enforcement agencies). That drain on the public fisc is likely only to increase as a result of "[c]rack cocaine addiction and its devastating consequences." Rice, *supra*, at 23; see also Office of Inspector General, U.S. Dep't of Health & Human Services, *Crack Babies* at 3 (June 1990) (study identifying 8,974 "crack baby" cases reported to child welfare agencies in eight metropolitan areas during a one-year period, and estimating their medical, foster-care, developmental and related costs through age five at approximately $2 billion).

The forfeiture provision of Section 881(a) addresses and seeks to remedy those problems in two ways.

First, Section 881(a) removes the instruments used by drug traffickers to ply their trade, see *United States* v. *Cullen*, 979 F.2d at 994, thereby protecting the community from the threat of continued drug dealing and advancing "the legitimate regulatory goal" of "preventing danger to the community." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). Second, as this Court has recognized, pursuant to 28 U.S.C. 524(c) (1988 & Supp. III 1991), forfeited assets "are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways," including funding federal, state, and local police protection. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. at 629 & n.6. That use of forfeited property makes Section 881(a) analogous to the statute considered by this Court in *United States* v. *Ward*, where "the fact that collected assessments [were] deposited in a revolving fund used to defray the expense of [oil spill] cleanup operations [was] a strong indicator of the pervasively civil and compensatory thrust of the statutory scheme." 448 U.S. at 256 (Blackmun, J., concurring in judgment).[6]

[6] Significantly, the statute at issue in *Ward* not only imposed a civil penalty on the person responsible for an oil discharge, but also authorized the United States to collect "the costs of removal, containment, or dispersal of a discharge from the person * * * responsible for that discharge in cases where that person * * * had been identified." *United States* v. *Ward*, 448 U.S. at 246. Civil penalties, and the revolving fund into which they were deposited, therefore effectively defrayed the costs of cleanup when the party responsible either could not be identified or had become insolvent. See *Ward* v. *Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979), rev'd, 448 U.S. 242 (1980). That is to say, the civil penalties upheld as remedial by the *Ward* Court were largely used to pay for the social costs created by others engaged in the defendant's business. *Ward* therefore answers petitioner's claim that defraying the social costs imposed on society by others engaged in drug trafficking is not a proper remedial objective. See Pet. Br. 32-33.

2. Petitioner's contention that a different result is required by *United States* v. *Halper*, *supra*, is wide of the mark. In *Halper*, the defendant was convicted of submitting false claims to the government, and was later sued for civil penalties based on the same conduct. Finding that the civil penalties assessed under the statute served no remedial purpose, the Court held that the civil penalties constituted "punishment" and that their imposition following a criminal penalty based on the same conduct violated the Double Jeopardy Clause. *Halper* did not constitute a major departure from the Court's traditional deference to Congress's denomination of remedies as civil or criminal; rather, it "announce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," 490 U.S. at 449, such that a nominally civil sanction "may not fairly be characterized as remedial, but *only* as a deterrent or retribution." *Ibid.* (emphasis added). As the Fourth Circuit recently explained, *Halper*'s analysis cannot readily be transposed to the civil forfeiture context:

> We do not believe that *Halper* requires such complicated, individualized accountings in forfeiture proceedings. *Halper* involved a civil penalty intended to substitute for damages suffered by the government for the fraudulent acts committed upon it. The remedial purpose of that penalty was one of compensation, and the amount sought

> by the government overwhelmed any realistic estimate of the government's pecuniary loss. Here, by contrast, the government seeks the forfeiture of the [claimants'] building not to compensate itself for any costs of investigation or prosecution, but to remove what had become a harmful instrumentality in the hands of the [claimants]. The public danger that the building poses in the hands of the [claimants] bears little relation to its monetary value, small or large.

United States v. *Cullen*, 979 F.2d at 995; accord *United States* v. *McCaslin*, 959 F.2d 786, 788 (9th Cir.) ("*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. * * * In such forfeitures there is no necessary relation between the value of the property forfeited and the loss to the government"), cert. denied, 113 S. Ct. 382 (1992). Indeed, far from supporting petitioner's claim that civil forfeitures are punishments, the principal significance of *Halper* to this case lies in its categorical rejection of petitioner's basic theory "that whether a sanction constitutes punishment must be determined from the defendant's perspective." *United States* v. *Halper*, 490 U.S. at 447 n.7.

The only court of appeals to conclude that civil *in rem* forfeitures can qualify as "punishment" under *Halper*—the Second Circuit—did so on the ground that the government in that case waived any claim that the property at issue was "an 'instrumentality of crime' " or otherwise "culpable." *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d at 37. Thus, the Second Circuit concluded that civil forfeitures can constitute punishment only by expressly disregarding the traditional justifications for those forfeitures. Instead, the court compared the value of the property forfeited with "the total value of cocaine sold inside it," *ibid.*—a figure that plainly bore no relation to the social harm caused by that drug transaction specifically, or by drug trafficking generally. Because the Second Circuit failed to consider the policies supporting the forfeiture of instrumentalities used to facilitate criminal activity, its decision that such forfeitures can amount to punishment under *Halper* is not analytically sound and should not be followed by this Court.[7]

[7] Finally, petitioner and his amici place some reliance on this Court's characterization of forfeiture proceedings as "quasi-criminal" in *United States* v. *Boyd*, 116 U.S. 616, 634 (1886), and *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), see ACLU Br. 15; Pet. Br. 24-27 (citing *One 1958 Plymouth Sedan* and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971)). Those decisions are limited to the Fourth and Fifth Amendment contexts. Moreover, while the Court has not repudiated the actual holding of *Boyd*—at least to the extent of permitting invocation of the privilege against compulsory self-incrimination when the claimant in a forfeiture proceeding faces a danger of prejudice "in respect to later criminal proceedings," *United States* v. *Ward*, 448 U.S. at 254—this Court "has declined * * * to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that '[s]everal of *Boyd's* express or implicit declarations have not stood the test of time.' " *United States* v. *Ward*, 448 U.S. at 253, quoting *Fisher* v. *United States*, 425 U.S. 391, 407 (1976). Indeed, some decisions of this Court appear to limit even the narrow Fifth and Fourth Amendment holdings of *Boyd* and *One 1958 Plymouth Sedan*, respectively, to forfeiture statutes under which a monetary penalty or forfeiture "could not be had" without a determination that the criminal law has been violated—as distinguished from statutes under which "no criminal offense, much less a criminal conviction, is required." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 236 n.6 (1972).

C. The Forfeitures In This Case Do Not Offend The Eighth Amendment Even If Proportionality Analysis Is Required For *In Rem* Civil Forfeitures

Finally, the forfeiture of petitioner's property should be upheld even if petitioner is correct that those forfeitures must pass "proportionality" scrutiny under the Excessive Fines Clause. While this Court has never adopted a standard of "excessiveness" under the Excessive Fines Clause, it has indicated that, under the parallel requirement of the Bail Clause, "to determine whether the Government's response is excessive, [one] must compare that response against the interest the Government seeks to protect by means of that response." *United States* v. *Salerno*, 481 U.S. at 754. Measured against that yardstick, the forfeiture of petitioner's property, far from being excessive, is well tailored to the government's interests both in obtaining compensation for the costs it has incurred and will continue to incur as a result of drug trafficking, and in protecting the community from further drug dealing.

The same conclusion follows under the proportionality tests this Court has fashioned under the Cruel and Unusual Punishments Clause. Even if the forfeiture of petitioner's property is characterized as punishment, the forfeiture cannot reasonably be thought "grossly disproportionate" to the harm caused by petitioner's actions in maintaining a retail outlet for cocaine distribution. See *Harmelin* v. *Michigan*, 111 S. Ct. at 2705-2706 (Kennedy, J., concurring in part and concurring in judgment). Petitioner's claim that proportionality analysis should ignore the grave social harm caused by his offense and concentrate instead on "the value of [the] controlled substances involved in the statutory violation," Pet. Br. 37, finds no support in logic or in this Court's cases. See, *e.g.*, *Harmelin* v. *Michigan*, 111 S. Ct. at 2706 (Kennedy, J., concurring in part and concurring in judgment); *Coker* v. *Georgia*, 433 U.S. 584, 598 (1977) (opinion of White, J.) (noting that "[b]ecause [the crime of rape] undermines the community's sense of security, there is public injury as well"). Still less supportable is the suggestion that the Constitution may require financial punishments to be calibrated so that the marginal disutility of the last dollar taken is the same for all individuals. ACLU Br. 28-29. The marginal utility of each additional day of freedom, no less than the marginal utility of each additional dollar, is different for each individual. Yet this Court has never required such individualized sentencing outside the capital context. See *Harmelin* v. *Michigan*, 111 S. Ct. at 2701-2702; *Chapman* v. *United States*, 111 S. Ct. at 1928-1929.

The evidence before the trial court showed that petitioner was engaged in the retail sale of cocaine, and that he was in possession of drugs, narcotics paraphernalia, and a substantial amount of cash in small bills. The forfeiture based on that conduct resulted in petitioner's loss of a house trailer and the premises of a small business, the total value of which petitioner estimates at less than $40,000. Pet. Br. 4-5. That loss was not grossly disproportionate to the serious narcotics distribution and possession offenses established by the evidence. Indeed, petitioner would have been subject to a fine of as much as one million dollars if he had been prosecuted for distribution of cocaine in federal court. See 21 U.S.C. 841(b)(1)(C). Thus, even if *in rem* civil forfeitures are subject to proportionality review, petitioner's challenge to the civil forfeiture of his property must fail.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Title 21, Section 881 (1988 & Supp. III 1991) provides:

§ 881. Forfeitures

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance

was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, ~~manu~~factured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act).

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in para-

graph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner

as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be

performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(h) of title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A),

except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may transfer title to the property to the State, either

without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

(f) Forfeiture and destruction of schedule I and II substances

(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

(g) Plants

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Title 28, Section 524(c) (1988 & Supp. III 1991) provides:

§ 524. Availability of appropriations

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(c)(1) There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following law enforcement purposes—

> (A) the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, or sell property under seizure, detention, or forfeited pursuant to any law enforced or administered by the Department of Justice, or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property; such payments may include—

(i) payments for contract services, the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties in an effort to maximize the return from such properties, and payments to reimburse any Federal, State, or local agency for any expenditures made to perform the foregoing functions; and

(ii) payments made pursuant to regulations promulgated by the Attorney General, that are necessary and direct program-related expenses for the purchase or lease of automatic data processing equipment (not less than a majority of which use will be program related), training, printing, contracting for services directly related to the identification of forfeitable assets, processing of and accounting for forfeitures, and the storage, protection, and destruction of controlled substances.

(B) the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States;

(C) at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund;

(D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary.

(E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice;

(F) for equipping for law enforcement functions any government-owned or leased vessels, vehicles, and aircraft available for official use by any federal agency participating in the Fund;

(G) for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, chapter 96 of title 18, or sections 1956 and 1957 of title 18; and

(H) after all reimbursements and program-related expenses have been met at the end of fiscal year 1989, the Attorney General may tranfer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.

Amounts for paying the expenses authorized by subparagraphs (A)(ii), (B), (C), (F), and (G) shall be specified in appropriations acts. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal

Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(2) Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for information pursuant to paragraph (1)(B) shall not exceed $250,000. Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited.

(3) Any amount under subparagraph (F) of paragraph (1) shall be paid at the discretion of the Attorney General or his delegate, except that the authority to pay $100,000 or more may be delegated only to the respective head of the agency involved.

(4) There shall be deposited in the Fund—

(A) all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C.

3375(d)), or the Postmaster General of the United States pursuant to 39 U.S.C. 2003(b)(7);

(B) all amounts representing the Federal equitable share from the forfeiture of property under any State, local or foreign law, for any Federal agency participating in the Fund.

(5) Amounts in the Fund, and in any holding accounts associated with the Fund which are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

(6) The Attorney General shall transmit to the Congress, not later than 4 months after the end of each fiscal year, detailed reports as follows:

(A) a report on—

(i) the estimated total value of property forfeited under any law enforced or administered by the Department of Justice with respect to which funds were not deposited in the Fund; and

(ii) the estimated total value of all such property transferred to any State or local law enforcement agency;

(B) a report on—

(i) the Fund's beginning balance;

(ii) sources of receipts (seized cash, conveyances, and others);

(iii) liens and mortgages paid and amount of money shared with State and local law enforcement agencies;

(iv) the net amount realized from the year's operations, amount of seized cash be-

ing held as evidence, and the amount of money legally allowed to be carried over to next year;

(v) any defendant's equity in property valued at $1,000,000 or more; and

(vi) year-end Fund balance; and

(C) a report for such fiscal year, containing audited financial statements, in the form prescribed by the Attorney General, in consultation with the Comptroller General, including profit and loss information with respect to forfeited property (by category), and financial information on forfeited property transactions (by type of disposition).

(7) The Fund shall be subject to annual audit by the Comptroller General.

(8) The provisions of this subsection relating to deposits in the Fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(9)(A) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (A)(ii), (B), (C), (F), and (G) of paragraph (1).

(B) Subject to subparagraph (C), in each of fiscal years 1990, 1991, 1992, and 1993, the Attorney General may transfer from the Fund not more than $150,000,000 to the Special Forfeiture Fund established by section 6073 of the Anti-Drug Abuse Act of 1988. Such transfers shall be made at the end of each quarter of the fiscal year involved and on a quarterly pro rata basis.

(C) Transfers under subparagraph (B) may be made only from excess unobligated amounts and only to the extent that, as determined by the Attorney General, such transfers will not impair the future availability of amounts for the purposes under paragraph (1). Further, transfers under subsection (B) may be made only to the extent that the sum of the transfers for the current fiscal year and the unobligated balance at the beginning of the current fiscal year for the Special Forfeiture Fund do not exceed $150,000,000.

(D) At the end of each of fiscal years 1990, 1991, 1992, and 1993, the Attorney General may retain in the Fund not more than $15,000,000, or, if determined by the Attorney General to be necessary for asset-specific expenses, a greater amount equal to not more than one-tenth of the total of obligations from the Fund in preceding fiscal year.

(E) Subject to the notification procedures contained in section 606 of Public Law 101-515, and after reserving the amounts authorized in subparagraph (D) above, any unobligated balances remaining in the Fund on September 30, 1991, and on September 30 of each fiscal year thereafter, shall be available to the Attorney General, without fiscal year limitation, to be transferred to any Federal agency to procure vehicles, equipment, and other capital investment items for law enforcement, prosecution and correctional activities, and related training requirements.

(10) Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Dtpartment, the Attorney General is authorized, at his discretion, to

warrant clear title to any subsequent purchaser or transferee of such forfeited property.

(11) For the purposes of this subsection, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to—

(A) any criminal forfeiture proceeding;

(B) any civil judicial forfeiture proceeding; or

(C) any civil administrative forfeiture proceeding conducted by the Department of Justice,

except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply.

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